In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 77-1609

TERRY T. TORRES,
Appellant,

—v.—

COMMONWEALTH OF PUERTO RICO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

APPELLANT'S REPLY BRIEF

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The government concedes, as it has in the past, that the Fourth Amendment prohibition against unreasonable searches and seizures is applicable to Puerto Rico as if it were a "state". (Brief for Appellee at 12.) It now also apparently concedes that Public Law 22, 25 L.P.R.A. §§ 1051-54, violates the Fourth Amendment. The government argues that because the majority of the Puerto Rico Supreme Court thought Public Law 22 violates the Fourth Amendment "there is no controversy requiring adjudication by this Honorable Court." (Brief for Appellee at 5-6.) The opinion of the majority below is cited with apparent

approval by the government (*id.* at 5, 7, 9), and nowhere in its brief does the government assert that Public Law 22 *is* constitutional.

Rather than attempting the impossible task of demonstrating the constitutionality of Public Law 22, the government has taken a tack that is praiseworthy for its brevity, but entirely without support in the law. It argues, as we read the brief, that one of the two issues on appeal was not properly presented below and that the alleged failure to present *that* issue below somehow deprives this Court of jurisdiction to hear *any* issue. The government characterizes the challenge to Article V, § 4 of the Puerto Rico Constitution (which requires a 5/8 majority to overturn a statute on constitutional grounds) as the "main issue on appeal." (Brief for Appellee at 13.) That exercise in wishful thinking cannot alter the fact that the Fourth Amendment is indeed the main issue on appeal. Furthermore, the assertion that the Article V, § 4 issue was not properly raised is without merit in any event, and whatever the merits of the government's argument with respect to Article V, § 4, the disposition of that issue cannot affect the power of this Court to strike down Public Law 22 for the constitutional outrage that it is.

1. The Challenge to Article V, § 4 Was Properly Raised Below and Is Properly Before This Court.

The government argues that the effect of the Supremacy Clause should not be considered because it was not specifically mentioned in the Petition for Reconsideration or in the Jurisdictional Statement. That contention ignores the reality of our federal system. Far from requiring specific mention, operation of the Supremacy Clause is implicit in every constitutional argument made. Indeed, this Court has described the clause as "the inevitable underpinning for the striking down of a state enactment which is inconsistent with federal law." *Swift & Co. v. Wickham,* 382 U.S. 111, 123 n.18 (1965).

The Supremacy Clause pervades constitutional decision-making in a manner unlike that of any other provision. Chief Justice Marshall described the operation of the Clause in *McCulloch v. Maryland,* 4 Wheat. 316, 4 L.Ed. 579 (1819). There, counsel for the United States had argued that the State of Maryland lacked the power to tax a branch of the bank of the United States. The Chief Justice said:

> There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rendering it into shreds.
>
> This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them. From this, *which may be almost termed an axiom, other propositions are deduced as corollaries,* on the truth or error of which, and on their application to this case, the cause has been supposed to depend.
>
> 4 Wheat. at 426, 4 L.Ed. at 606 (emphasis added.)

Since this Court's decision in *Martin v. Hunter's Lessee,* 1 Wheat. 304, 341-44 (1816), the Supremacy Clause has been understood to require the subordination of local law to federal law whenever the two are in conflict. This unconditional allegiance to the principles embodied in the Federal Constitution is formalized in the oath of office taken by all members of the judiciary of Puerto Rico. Constitution of the Commonwealth of Puerto Rico, Art. VI, § 16 (48 U.S.C. § 731d); Puerto Rican Federal Relations Act, 47 Stat. 158, 48 U.S.C. § 874. Consideration of the Supremacy Clause is therefore implicit in every decision rendered by the courts of Puerto Rico where a possible conflict between federal and local law is raised.

Moreover, Appellant's Motion for Reconsideration left no doubt as to the Supremacy Clause problems raised by Article V, § 4. In that motion, Appellant claimed that application of Article V, § 4 deprived him "of his right to a full and fair hearing as required by the case of *Stone v. Powell,* 428 U.S. 465 . . . ." (Motion for Reconsideration, ¶ 7, reprinted in Motion to Dismiss or Affirm at App. A, pp. 3a-4a.) The concept of a "full and fair hearing" under *Stone* presupposes adherence by local courts to the mandate of the Supremacy Clause.

> [W]e are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law. Martin v. Hunter's Lessee, 1 Wheat. 304, 341-344, 4 L.Ed. 97 (1816).

428 U.S. 465, 493 n.35.

Article V, § 4 rendered the Supreme Court of Puerto Rico incapable of performing its "constitutional obligation to safeguard personal liberties and to uphold federal law." 428 U.S. at 493 n.35. Appellant's Motion for Reconsideration afforded the court ample opportunity to review its decision in light of its constitutional obligations. Its refusal to do so places the matter squarely within the jurisdiction of the Supreme Court of the United States.

Nor has this Court insisted that petitioners correctly specify the constitutional provision on which they base their appeals. In *Braniff Airways v. Nebraska State Board,* 347 U.S. 590 (1954), the appellant relied on the Commerce Clause rather than the Due Process Clause of the Fourteenth Amendment, thereby "nam[ing] the wrong constitutional clause to support its position." 347 U.S. at 598. The Court found: "Though inexplicit, we consider the due process issue within the clear intendment of such contention and hold such issue sufficiently presented." 347 U.S. at 599. The underlying intendment is no less obvious here, where the clause invoked goes to the very essence of our federal system.

Finally, the government continues to argue that Appellant's challenge to Article V, § 4 of the Puerto Rico Constitution was not timely and that an issue raised for the first time in a petition for rehearing comes too late.

It is beyond dispute, however, that Appellant could not have raised the issue before the judgment of the Puerto Rico Supreme Court had been rendered. He had no idea who would participate or what the vote would be. Moreover, Rule 45(d) of the Rules of the Puerto Rico Supreme

Court (quoted in the Motion to Dismiss or Affirm at 7) expressly provides for consideration of untimely petitions for reconsideration so long as "execution of the mandate" is not adversely affected. Since the Puerto Rico Supreme Court had already stayed the mandate pending appeal to this Court, the mandate could not have been adversely affected by that court's reconsideration.

Indeed, in *Ohio ex rel. Bryant v. Akron Metropolitan Park District,* 281 U.S. 74, 79 (1930), the continuing validity of which is called into question here, the issue was raised for the first time after judgment, and it was fully considered on the merits by this Court. *See, Great Northern R. Co. v. Sunburst Oil & Ref. Co.,* 287 U.S. 358-366-67 (1932); *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 677-78 (1930).

2. The Judgment Below Is Final.

The government presents the novel argument that the challenge to Article V, § 4 was not properly raised below and that, therefore, "the judgment entered is not an appealable judgment or decree under the provisions of 28 USC 1258." (Brief for Appellee at 5.) As we understand it, the government appears to contend that if one issue is not presented to a court below, an appellant may never appeal at all because the judgment below is not "final" until all conceivable issues are decided.[1] This argument ignores the fact that Appellant's challenge to Article V, § 4 is based on both the Due Process and the necessarily

[1]In its Motion to Dismiss or Affirm the government also claimed that the issue had not been properly raised, but it apparently recognized that such a failure would only affect that issue and not the jurisdiction of the Court over other issues. (Motion to Dismiss or Affirm at 4.)

included Supremacy Clause of the United States Constitution. The government does not question that Appellant's due process claim was explicitly raised in his Motion for Reconsideration and passed upon by the Supreme Court of Puerto Rico.

The government's reliance on the final judgment rule is similarly misplaced. The final judgment rule has nothing to do with what issues were presented. A final judgment

> must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.
>
> *Market Street Ry. Co. v. Railroad Commission,* 324 U.S. 548, 551 (1945).

The same standard is applicable to appeals from the Puerto Rico Supreme Court. *Buscaglia v. District Court of San Juan,* 145 F.2d 274, 280-81 (1st Cir. 1944), *cert. denied,* 323 U.S. 793 (1945).

The Judgment is reproduced at Appendix B to the Jurisdictional Statement (pp. 99-100). It speaks for itself:

> JUDGMENT
>
> San Juan, Puerto Rico, December 14, 1977
>
> The search of appellant's belongings being based on the provisions of Act No. 22 of August 6, 1975, and considering the absence of the majority vote required by the Constitution to annul said Act, the judgment appealed is affirmed. Mr. Justice Rigau took no part in this decision. Mr. Justice Irizarry Yunqué delivered an opinion based on the unconstitutionality

of said law. Mr. Chief Justice Trías Monge and Mr. Justice Dávila and Torres Rigual concur with said opinion. Mr. Justices Martín, Díaz Cruz, and Negrón García rendered separate opinions establishing the legality of the search and the constitutionality of the law.

It was so decreed and ordered by the Court and certified by the Chief Clerk. (Footnote quoting Article V, § 4 omitted.)

3. The Judgment Appealed From Is One "In Favor of the Validity" of Public Law 22 and This Court's Appellate Jurisdiction Was Properly Invoked.

The government would have this Court interpret the word "decision" in 28 U.S.C. § 1258(2) to mean "opinion" rather than judgment. It appears to argue that the Court has no appellate jurisdiction because the majority below adopted Appellant's position even though the judgment, if upheld, would send him to prison.

The fallacy of such reasoning should be self-evident. The purpose of § 1258(2) is to facilitate review by this Court when a statute is challenged on federal constitutional grounds and when, after all is said and done in the Puerto Rico courts, the statute still stands. The word "decision" here was obviously intended to mean the same as "judgment". *See, In the Matter of the Application of Tiffany,* 252 U.S. 32, 36 (1920); *Catlin v. United States,* 324 U.S. 229, 233 (1945).

Even if the government's play on words had any merit it would not affect this Court's jurisdiction, since an "unrestricted notation of probable jurisdiction of the appeal is to be understood as a grant of the writ [of certiorari] . . . ." *Mishkin v. New York,* 383 U.S. 502, 512 (1966); 28 U.S.C. § 2103, 76 Stat. 556.

4. The Government's Discussion of the Merits of Appellant's Challenge to Article V, § 4 Is Both Unpersuasive and Inaccurate.

The government cites three cases in support of its proposition that "[p]rovisions similar to . . . Article V, Sec. 4, appear in the constitutions of several states and their validity has been sustained by this Honorable Court." (Brief for Appellee at 13, ¶ 2.)

The government's citations are misleading at best. In fact, only one of the cases cited was rendered by this Court. *Ohio ex rel. Bryant v. Akron Metropolitan Park District,* 281 U.S. 74 (1930). Nor does the government attempt to refute Appellant's analysis of that case. See Brief for Appellant at 65. The government's second case, *City of Bismarck v. Materi,* 177 N.W. 2d 530 (N.D.1970), discusses the state constitution's full-majority provision, but does not examine or uphold its validity.

Nor does the third case cited by the government, *Funkhouser v. Spahr,* 102 Va. 306, 46 S.E. 378 (1904), rule specifically on the constitutionality of the state's full-majority provision. It simply holds that the provision did not apply to the case before it. 46 S.E. at 380.

The government concludes its review of state provisions which require full majorities with this sentence: "North Dakota, Arizona, Virginia and Colorado have very similar provisions." (Brief for Appellee at 13.) The government

fails to provide supporting citation for its proposition. Nor can it. The Arizona and Colorado constitutions do not require greater than normal majorities. They require only that the court sit en banc before it may declare a law unconstitutional. Ariz. Const. art. 6, § 2; Colo. Const. art. VI, § 5(1).

CONCLUSION

The government's attempt to deflect the Court from the Fourth Amendment issue has no basis in law. For the foregoing reasons and those presented in the Brief for Appellant, the conviction should be reversed.

Respectfully submitted,

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